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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1962

No. 240

ANDBE MAXIMOV, ETC., PETITIONER,

vs.

UNITED STATES.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

PETITION FOR CERTIORARI FILED JULY 10, 1962

CERTIORARI GRANTED OCTOBER 8, 1962

SUPREME COURT OF THE UNITED STATES

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ANDRE MAXIMOV, ETC., PETITIONER,

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**IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

Civil No. 152-144

**ANDRE MAXIMOV, as Trustee for the benefit of H. Robbin
Fedden u/a dated 10/24/47, Plaintiff,**

v.

UNITED STATES OF AMERICA, Defendant.

DOCKET ENTRIES

DATE	PROCEEDINGS
Oct. 28-59	Filed complaint and issued summons.
Nov. 12-59	Filed summons & return, served USA by (Rohnitzky) and by reg. mail to Atty. Gen'l 10-30-59.
Dec. 28-59	Filed answer of deft
June 20-60	Filed plttf's affdvt. and notice of motion for summary judgment ret. 6-28-60
Aug. 22-60	Filed attorney's notice of change of firm name
Oct. 28-60	Filed notice of motion for summary judgment ret. 11-1-60
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Jan. 4-61	Filed Opinion #26568 denying deft's motion & granting plttf's motion for summary judgment. So ordered—MacMahon, J.— mailed notices of entry 1/4/61
Jan. 4-61	Filed amended & supplemental affdt. of H. R. Fedden in support of plttf's motion
Jan. 4-61	Filed exhibit & stip. making plttf's exh. A part of record for summary judgment

DATE

PROCEEDINGS

- Feb. 28-61 Filed notice of appeal from judgment in USDC on 1-4-61 mailed copy to Hill, Betts, etc.
- Mar. 8-61 Filed order & judgment #64079 plttf have judgment against deft. USA in the sums of \$53.10 and \$1,316.32 together with lawful interest thereon and that plttf. have execution therefor, MacMahon, J. Judgment entered 3-8-61 Clerk
- Apr. 10-61 Filed stip & order extending time to file record on appeal to 5/26/61—Palmieri, J.

[fol. 3]

IN UNITED STATES DISTRICT COURT

COMPLAINT—Filed October 28, 1959

1. Plaintiff brings this action against the United States of America for the recovery of income taxes illegally and erroneously assessed and collected from the plaintiff. Plaintiff is a citizen of the United States and jurisdiction is conferred upon this Court by 28 U.S.C. 1346(a)(1).

2. Plaintiff's claim is for the recovery of \$53.10 and \$1,316.32 in principal amount of income taxes illegally and erroneously assessed and collected from the plaintiff for the calendar years 1954 and 1955, together with interest thereon.

3. Plaintiff duly filed United States Fiduciary Income Tax Returns for the years 1954 and 1955 with the District Director of Internal Revenue for Lower Manhattan, New York, and duly paid the taxes shown due thereon in the sums of \$53.10 for 1954 and \$1,316.32 for 1955.

4. On or about February 10, 1958, plaintiff filed with said District Director of Internal Revenue claims for refund for \$53.10 for the year 1954 and \$1,316.32 for 1955. Copies of such claims for refund are attached hereto as Exhibits A and B.

5. Under date of August 28, 1959, said District Director of Internal Revenue sent plaintiff notices of disallowance of said claims.

[fol. 4] 6. The facts upon which said claims are based are as follows:

a. The taxes paid herein were for capital gains from the sale of securities.

b. The beneficiary of the trust herein is an Englishman and resides in the United Kingdom and is a non-resident alien of the United States, not engaged in trade or business in United States.

c. The Income Tax Treaty between the United States and the United Kingdom (Article XIV) provides that gains from the sale of capital assets by a non-resident alien individual who was a resident of the United Kingdom are exempt from the federal income tax.

7. No part of the aforesaid \$53.10 and \$1,316.32 of income taxes illegally and erroneously assessed and collected from the plaintiff for the years 1954 and 1955 have been refunded to the plaintiff.

8. By virtue of the aforesaid, the United States became and now is indebted to the plaintiff in the full amounts of \$53.10 and \$1,316.32 with interest as provided by law.

Wherefore, plaintiff claims judgment against the defendant in the sums of \$53.10 and \$1,316.32 with interest thereon as provided by law.

[fol. 5]

EXHIBIT A, ANNEXED TO COMPLAINT

CLAIM

TO BE FILED WITH THE DISTRICT DIRECTOR WHERE
ASSESSMENT WAS MADE OR TAX PAID

Name of taxpayer . . . —Trust f.b.o. H. Robbin Fedden
U/A dated 10/24/47 Andre Maximov, Trustee

Number and street—26 Broadway }

City, town, postal zone, State—New York 4, N.Y.

1. District in which return (if any) was filed—Same
2. Name and address shown on return, if different from above—Andre Maximov Trustee U/A for H. Robbin Fedden, c/o Irving Trust Co. (as Custodian), one Wall Street, New York 15, N.Y.
3. Period . . . —From January 1, 1954 To December 31, 1954.
4. Kind of tax—income.
7. Amount to be refunded—\$53.10 and interest
9. The claimant believes that this claim should be allowed for the following reasons: See sheet attached

I declare under the penalties of perjury that this claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

Signed ANDRE MAXIMOV
Trustee f.b.o. H. Robbin Fedden
U/Adtd 10/24/47

Dated Feb. 10, 1958

[fol. 6] Capital gains from the sale of securities were included as income in the fiduciary tax return (form 1041) of this trust for 1954.

The beneficiary of this trust is an Englishman, who resides in the United Kingdom. All capital gains realized by this trust are retained as corpus.

The income tax treaty between the United States and the United Kingdom (Art. XIV) provides that gains from the sale of capital assets by a non-resident alien individual who is a resident of the United Kingdom are exempt from Federal income tax.

This exemption has been held to apply to capital gains realized by a trust for beneficiaries residing in the United Kingdom and retained as corpus of the trust (*American Trust Co. v. James G. Smyth and U.S.A.*, U. S. Court of Appeals 9th Circuit, No. 15,339, decided July 8, 1957, reported at 1957 C.C.H. Standard Federal Tax Reporter, Para. 9824).

If capital gains are excluded from the tax return of this trust for 1954, there is no taxable income for 1954.

The corrected computation follows:

Total income originally reported		\$3,023.00
<u>Deduct</u> net gain from sale of capital assets (item 8 (b))		1,131.05
		<hr/>
Corrected income		1,891.95
Total deductions reported	\$2,609.38	
<u>Deduct</u> long-term capital gain deduction (item 20)	565.53	
	<hr/>	
Corrected deductions		2,063.85
		<hr/>
Corrected taxable income		- 0 -

A tax of \$53.10 was paid for 1954, based on the erroneous inclusion of capital gain. The refund thereof, with interest thereon, is respectfully requested.

[fol. 7]

EXHIBIT B, ANNEXED TO COMPLAINT

CLAIM

TO BE FILED WITH THE DISTRICT DIRECTOR WHERE
ASSESSMENT WAS MADE OR TAX PAID

Name of taxpayer . . . —Trust f.b.o. H. Robbin Fedden
U/A dated 10/24/47 Andre Maximov, Trustee

Number and street—26 Broadway

City, town, postal zone, State—New York 4, N.Y.

1. District in which return (if any) was filed—Same
2. Name and address shown on return, if different from above—Andre Maximov Trustee f/b/o H. Robbin Fedden U/A dated 10/24/47, 120 Broadway, New York 5, N.Y.
3. Period—From January 1, 1955 To December 31, 1955
4. Kind of tax—income
7. Amount to be refunded—\$1,316.32 & interest
9. The claimant believes that this claim should be allowed for the following reasons: See sheet attached

I declare under the penalties of perjury that the claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

Signed ANDRE MAXIMOV
Trustee f.b.o. H. Robbin Fedden
U/Adtd 10/24/47

Dated Feb. 10, 1958

[fol. 8] 1. Capital gains from the sale of securities were included as income in the fiduciary tax return (form 1041) of this trust for 1955.

The beneficiary of this trust is an Englishman, who resides in the United Kingdom. All capital gains realized by this trust are retained as corpus.

The income tax treaty between the United States and the United Kingdom (Art. XIV) provides that gains from the sale of capital assets by a non-resident alien individual who is a resident of the United Kingdom are exempt from Federal income tax.

This exemption has been held to apply to capital gains realized by a trust for beneficiaries residing in the United Kingdom and retained as corpus of the trust (*American Trust Co. v. James G. Smyth and U.S.A.*, U. S. Court of Appeals 9th Circuit, No. 15,339, decided July 8, 1957, reported at 1957 C.C.H. Standard Federal Tax Reporter, Para. 9824).

2. Due to an arithmetical error, the deduction for distribution to beneficiaries (item 18) in the 1955 fiduciary income tax return of this trust was stated to be \$2,623.59; it should have been \$2,624.59, an error of \$1.00.

3. If capital gains are excluded from the tax return of this trust for 1955, and if the correction is made of the error mentioned in 2. above, there is no taxable income for 1955.

[fol. 9] 4. The corrected computation follows:

Total income reported	\$16,700.78	
Deduct net gain from sale of capital assets (item 8 (b))	13,776.18	
Corrected income		\$2,924.60
Total deductions reported	8,890.28	
Deduct long term capital gain deduction (item 20)	5,966.69	
	2,923.59	
Add error in deduction for distribution to beneficiaries (it. 8)	1.00	
		2,924.59
Corrected taxable income		- 0 -

A tax of \$1,316.32 was paid for 1955, based on the erroneous inclusion of capital gain. The refund thereof, with interest thereon, is respectfully requested.

[fol. 10]

IN UNITED STATES DISTRICT COURT

ANSWER—Filed December 28, 1959

The United States of America, by its attorney, S. Hazard Gillespie, Jr., United States Attorney for the Southern District of New York, for its answer to plaintiff's complaint admits, denies and alleges as follows:

I

Admits the allegations in paragraph 1 thereof, except it is denied that any income taxes were illegally and erroneously assessed and collected from the plaintiff.

II

Admits the allegations in paragraph 2 thereof, except it is denied that any part of the amounts of \$53.10 and of \$1,316.32 were illegally and erroneously assessed and collected from the plaintiff for the calendar years 1954 and 1955.

III

Admits the allegations in paragraph 3 thereof.

IV

Admits the allegations in paragraph 4 thereof, except specifically to deny any statements of fact in the plaintiff's claims for refund that are not admitted in this answer.

V

Admits the allegations in paragraph 5 thereof.

[fol. 11]

VI

Admits the allegations in the portion ending with a colon in the second line thereof, also,

(a) Admits the allegations in subparagraph a. of paragraph 6 thereof.

(b) Denies the allegations in subparagraph b. of paragraph 6 thereof, except it is admitted that the beneficiary of the trust is H. Robin Fedden, 20 Eldon Road, W 8, Kensington, W. S., England, a non-resident alien of the United States.

(c) Denies the allegations in subparagraph c. of paragraph 6 thereof.

VII

Denies the allegations in paragraph 7 thereof, except it is admitted that no part of the amounts of \$53.10 and of \$1,316.32 have been refunded to the plaintiff.

VIII

Denies the allegations in paragraph 8 thereof.

Wherefore, defendant, United States of America, having fully answered prays for judgment in its favor dismissing plaintiff's complaint together with its costs and disbursements and for all other proper and just relief.

[fol. 12]

IN UNITED STATES DISTRICT COURT

STIPULATION OF AUTHENTICITY OF ANNEXED COPY OF TRUST INDENTURE—Filed January 4, 1961

It is hereby stipulated and agreed by and between the attorneys for the respective parties that the attached copy of an indenture made the 24th day of October, 1947 and marked Plaintiff's Exhibit A is a true copy of the indenture creating a trust which gives rise to the captioned action, and it is

Further hereby stipulated and agreed that said attached Exhibit A be, and the same hereby is, made part of the record in plaintiff's motion for summary judgment in the

captioned proceeding and in the cross-motion made by the defendant.

Dated: New York, N. Y.

October 25, 1960

[fol. 13]

PLAINTIFF'S EXHIBIT A, ANNEXED TO STIPULATION
OF AUTHENTICITY

DEED OF TRUST

THIS INDENTURE made the 24th day of October 1947, between H. ROBBIN FEDDEN, of Polesden Lacey, near Dorking, Surrey, England, hereinafter referred to as "the Grantor", party of the first part, and F. K. MIDDLETON HUNTER, of No. 66 Old South Road, in the Village of Southport, in the Town and County of Fairfield, and State of Connecticut, hereinafter referred to as "the Trustee", party of the second part,

WITNESSETH, that, WHEREAS the Grantor proposes to create a trust of certain personal property hereinafter described, on the terms and conditions and for the purposes hereinafter set forth, and the Trustee is willing to accept the said trust,

NOW, THEREFORE, for and in consideration of the premises, the covenants and mutual agreements herein contained, and for other good and valuable consideration, the receipt whereof is hereby acknowledged, the Grantor has granted, conveyed, assigned, transferred and delivered, and by these presents does grant, convey, assign, transfer and deliver unto the Trustee, and his successors, the property described in "SCHEDULE I" annexed hereto and made a part hereof.

TO HAVE AND TO HOLD all and singular the said stocks, securities and other personal property unto the Trustee and his successors, in trust nevertheless, for the uses and purposes and upon the terms and conditions hereinafter set forth.

[fol. 14] FIRST: To hold the said stocks, securities and other personal property, and to collect the income there-

from, and after defraying the expenses incurred in the administration of the trust, including the Trustee's commissions, to pay the net of the said income quarterly (or at such other periods as the Grantor may in writing direct), to the Grantor for his own use and benefit, during the term of his natural life, and from and after his death to RENEE FEDDEN, the wife of the Grantor, during the term of her natural life (provided at the time of Grantor's death he and his said wife shall be married to each other) and upon the death of the said RENEE FEDDEN, wife of the Grantor, or upon the death of the Grantor should his said wife predecease him or not be married to him at the time of his death, to pay over and deliver the entire principal of the trust to the then surviving issue of the Grantor, in equal shares, per stirpes; provided, however, that if any such issue shall then be under the age of twenty-one years, the share of each of such issue who shall be an infant shall be retained by the Trustee in trust, and paid over to the said issue upon his or her attaining the age of twenty-one years. If there shall be no issue surviving the Grantor, then the Trustee shall pay over the principal to whomever the Grantor shall appoint by will, or if he should fail to do so, to the distributees of the Grantor at the time of the death of the Grantor, as then established by the laws of intestate succession of the State of Connecticut.

SECOND: At any time during the existence of this trust, the Trustee may in his discretion pay over in his absolute discretion, any portion or portions of the principal to the [fol. 15] then life beneficiary, if in the discretion of the Trustee such payments are necessary or desirable to defray any unusual expenses incurred as the result of illness, disability or other emergency affecting the life beneficiary or his wife or children, and, in the case of any beneficiary who may be a minor, to defray the expenses of his or her maintenance or education. The discretion of the Trustee as to all such payments shall be absolute and his decision shall be binding upon all parties interested.

THIRD: The Trustee may cause stocks or securities held by him as a part of the trust estate to be registered

in his name as Trustee, or in the name of a nominee or nominees, or may hold the same unregistered or payable to bearer, and shall receive the income thereon and shall deal with and pay over such income as directed herein.

The Trustee may continue to hold as part of the corpus of the trust hereby created, the shares of stock of securities hereinbefore described and shall not be liable for any loss to the trust estate by reason of the decrease in the value of such stocks or securities, and except as otherwise provided herein, the Trustee may sell the said stocks or securities, or any part thereof, in his discretion.

No purchaser from the Trustee shall be required to see to the application by the Trustee of the purchase money, or to inquire into the validity, expediency or propriety of any such sale.

The Trustee may, in his uncontrolled discretion, distribute the trust estate upon the termination of the trust, in kind or partly in kind and partly in money.

[fol. 16] The Trustee may invest any cash at any time standing to the credit of the corpus of the Trust estate in any securities which he may deem suitable, whether or not such securities are legal investment for trust funds under the laws of the State of Connecticut, or of any other State, and shall not be liable for any loss to the trust estate by reason of any such investment made by him in good faith.

This deed of trust is made subject to the right and privilege of the party of the first part hereto at any time in his discretion during his life, by written instrument signed by him, to change the stocks, bonds or other securities or the relative amounts thereof which shall be held as part of the trust estate as well as to designate the stocks, bonds or other securities in which investments shall be made by the Trustee.

Whenever the Trustee shall receive shares of stock of a corporation by way of a stock dividend upon shares of stock of the same corporation held by the Trustee as a part of the trust estate, or shares of stock of other corporations distributed by way of an extraordinary dividend by an corporation whose shares of stock are held by the Trustee as a part of the corpus of the trust estate, the Trustee shall retain in the corpus of the trust estate all

such stock dividends or extraordinary dividends unless the Trustee shall be advised by counsel that by reason of statutory enactment or construction such retention is in whole or in part an illegal retention of income, in either of which cases the Trustee shall distribute to the persons entitled thereto as income that portion of the stock or extraordinary dividend so received which represents such accumulation.

[fol. 17] In case a corporation, any of whose shares of stock compose a part of the principal of the trust estate, shall issue new or additional stock or other securities with the prior right of its stockholders to subscribe therefor, the Trustee is authorized to subscribe and pay for the whole or any part of its pro rata amount of such stock or securities; proceeds of such rights, if sold, to belong to the principal. If the Trustee is not at the time holding sufficient cash to permit the exercise of his rights by paying for such additional stock or other securities, he may borrow the necessary money upon the credit of the trust estate provided the Grantor if then living shall in writing consent thereto, or the Trustee may sell such amounts of such rights as are needed to enable him to pay for the balance of the rights to which he is entitled.

The Trustee may consent to the reorganization or consolidation of any corporation, or the sale to any other corporation of the property of any corporation, any of whose stocks, bonds or other securities are held by the Trustee hereunder, and may do any act in reference to such stock, bonds or other securities necessary or proper to enable him to obtain the benefit of any such reorganization, consolidation or sale, and in case any of the stock, bonds or other securities so held shall at any time contain an option or options to the holder thereof, or the ownership thereof shall entitle such holder to convert the same into stocks, bonds or other securities, the Trustee may exercise such option or options and make such conversion or conversions and make any necessary payments therefor out of any funds available in the trust estate, and thereafter hold, manage or dispose of such stocks, [fol. 18] bonds or other securities so acquired as a part of the whole of the trust estate.

Whenever the Trustee shall hold as a part of the trust estate any security acquired by him at a premium over face value, no part of the income therefrom shall be deducted or set apart as a sinking fund for the amortization of such premium.

FOURTH: Additional stocks, bonds or other securities, property or moneys may hereafter be added to the trust estate by the party of the first part and shall be taken as a part thereof as fully as if the said stocks, bonds or other securities, property or moneys had been originally transferred and made a part of the trust estate at the time of the execution of this agreement.

FIFTH: The reasonable and proper expenses of the party of the second part as Trustee shall be a first charge upon the income of the said trust estate, and no trustee shall be liable to any person interested in this trust, except for bad faith or wilful default or gross negligence.

The Trustee may at all times, at the expense of the trust estate, advise with counsel and shall be fully protected in respect of any action under this agreement taken or suffered in good faith by the Trustee, in accordance with the opinion of counsel. The Trustee shall not be liable for the exercise of any discretion hereunder or any errors of judgment, nor for any act done or step taken or omitted, under the advice of counsel.

SIXTH: The rights of each and every of the parties at any time interested in the trust estate hereby created shall be [fol. 19] determined, controlled and governed by the laws of the State of Connecticut.

The Grantor covenants and agrees to execute and deliver such other and further instruments of conveyance or assignment as the Trustee may require or deem necessary.

SEVENTH: If at any time the Trustee shall resign or die or become incapable from any cause whatsoever properly to execute the duties and powers herein conferred upon him as Trustee, then and in that event ANDRE MAXIMOV shall become successor Trustee, and as such successor Trustee shall have all the powers of the Trustee hereunder. If the said ANDRE MAXIMOV should for any reason

be or become unwilling or unable to act, the successor Trustee shall be appointed by the then life beneficiary of this trust, or, if such beneficiary be a minor, then by the guardian of such minor.

EIGHTH: This trust is irrevocable, and may not be amended, except that the Grantor reserves the right to terminate this trust at any time after twenty (20) years from the date hereof, upon six (6) months notice in writing to the then Trustee of this trust.

[fol. 20] IN WITNESS WHEREOF, the parties hereto have hereunto set their hand and seals the day and year first above written.

H. ROBIN FEDDEN

By /s/ F.K.M. HUNTER (L.S.)
Attorney in Fact

/s/ F.K.M. HUNTER (L.S.)

Signed, sealed and delivered
in the presence of:

/s/ ANDRE MAXIMOV

[STATEMENT AND SIGNATURE OF NOTARY PUBLIC
AND SCHEDULE I OF TRUST OMITTED]

[fol. 21] I, F. K. MIDDLETON HUNTER, of 19 Old Barn Road, Fairfield, Connecticut hereby resign as Trustee of the Trust Indenture dated October 24, 1947 between H. Romilly Fedden, as Grantor, and myself as Trustee.

January 3, 1955

/s/ F. K. MIDDLETON HUNTER

State of New York,
County of New York—ss.:

[STATEMENT AND SIGNATURE OF NOTARY PUBLIC OMITTED]

I, ANDRE MAXIMOV, hereby consent to act as successor Trustee of the Trust Indenture dated October 24, 1947 between H. ROMILLY FEDDEN, as Grantor, and F. K. MIDDLETON HUNTER, as Trustee.

January 3, 1955

/s/ ANDRE MAXIMOV

State of New York,
County of New York—ss.:

[STATEMENT AND SIGNATURE OF NOTARY PUBLIC OMITTED]

[fol. 22]

IN UNITED STATES DISTRICT COURT

AMENDED AND SUPPLEMENTAL AFFIDAVIT OF H. R. FEDDEN—
Filed January 4, 1961

Great Britain and Northern Ireland,
London, England,
Embassy of the United States—ss.:

H. R. Fedden, being duly sworn, deposes and says:

1. I am both the settlor and the income beneficiary of the captioned trust and submit this affidavit in support of the plaintiff's motion for summary judgment in the captioned proceeding.

2. I am a citizen of the United Kingdom, residing since 1951 at 20 Eldon Road, London W. 8, England. From October 24, 1947, the date of the creation of the captioned trust, to the beginning of 1951, I resided at Polsden Lacey, North Dorking, Surrey, England and have been during this entire period a resident of the United Kingdom for the purposes of United Kingdom tax and at no time have I been engaged in trade or business within the United States.

3. I presently reside with my wife, Renee Fedden, and my infant children, Katharine, age 16, and Frances, age

12, who are my only issue, and have at all times hereinbefore mentioned resided with my said wife, Renee, and my said children, Katharine and Frances at the addresses hereinbefore set forth.

[fol. 23] 4. My wife, Renee Fedden, is a citizen of the United Kingdom, and my issue, Katharine and Frances, are citizens of the United Kingdom.

5. Both my wife, Renee, and my two children, Katharine and Frances, are residents of the United Kingdom for the purposes of United Kingdom tax are not engaged in trade or business in the United States.

6. My wife, Renee, my infant children, Katharine and Frances, and I have not at any time hereinbefore set forth been domiciled in the United States, nor has any one of us been a resident of said United States for any purpose.

7. Since October, 1947, I have been employed by the National Trust for Places of Historic Interest or Natural Beauty; since January, 1951, I have held my present position of Historic Buildings Secretary and have been in the United States only once, that is in October 1958, for a period of about three weeks on a speaking tour on behalf of the National Trust.

H. R. Fedden

Sworn to before me, this Seventh day of November, 1960.
Catherine A. Rock, Consul of the United States of America
at London, England.

[fol. 24]

IN UNITED STATES DISTRICT COURT

MEMORANDUM OPINION OF MACMAHON, J.—January 4, 1961

This is an action to recover taxes paid by the plaintiff in his capacity as trustee for capital gains realized by the trust from the sale of securities in 1954 and 1955.

The parties have stipulated that there are no issues of fact and have cross-moved for summary judgment. The

only question of law involved is whether a trustee of an *inter vivos* trust established under the laws of Connecticut is exempt from taxes on capital gains realized by the trust and applied to the corpus where all of the trust beneficiaries are residents of the United Kingdom not engaged in trade or business in the United States.

The question presented is in all material respects identical to that thoroughly considered and decided adversely to the defendant's position in *American Trust Company v. Smyth*, 247 F. 2d 149 (9 Cir. 1957). In that case, the Court held that the intent of the Income Tax Convention between the United States and the United Kingdom, signed April 16, 1945, effective January 1, 1945, 60 Stat. 1377, was to effect full reciprocity and equality of tax treatment between nationals of the two countries. The United Kingdom does not impose an income tax upon capital gains. The Court rejected the government's contention that the trust was a separate taxable entity under United States laws and held the gains exempt since the individual beneficiaries who would feel the economic burden of the tax were entitled to the exemption provided by the treaty. 26 U.S.C.A. §894.

[fol. 25] While not bound by the Ninth Circuit decision, its rationale on the same material facts is a persuasive argument for granting plaintiff's motion. Accordingly defendant's motion is denied and plaintiff's motion for summary judgment is granted. So ordered.

Dated: New York, N. Y.
January 4, 1961

Lloyd F. MacMahon, U. S. D. J.

Judgment entered: 1/4/61

[fol. 26]

IN UNITED STATES DISTRICT COURT

[Title omitted]

JUDGMENT ENTERED MARCH 8, 1961

• • • • •

The plaintiff having moved this Court for summary judgment pursuant to the provisions of Rule 56 of the Federal Rules of Civil Procedure and the defendant having served its cross notice of motion for summary judgment and the motions having come on to be heard, and Hill, Betts, Yamaoka, Freehill & Longcope, attorneys for the plaintiff (William F. Suglia, of Counsel) having appeared in support of plaintiff's motion for summary judgment and in opposition to defendant's cross motion therefor, and S. Hazard Gillespie, Jr., United States Attorney for the Southern District of New York (Herbert F. Roth, Esq., of Counsel) having appeared in opposition to plaintiff's motion for summary judgment and in support of defendant's cross motion therefor,

Now, upon motion of Hill, Betts, Yamaoka, Freehill & Longcope, attorneys for the plaintiff, it is

Ordered and adjudged that plaintiff have judgment against defendant United States of America in the sums of \$53.10 and \$1,316.32 together with lawful interest thereon and that plaintiff have execution therefor.

Dated: New York, New York,
March 7th, 1961.

Lloyd F. MacMahon, U. S. D. J.

[fol. 27]

IN UNITED STATES DISTRICT COURT
 NOTICE OF APPEAL—Filed February 28, 1961

• • • • •

Notice is hereby given that the United States of America, the above-named defendant, hereby appeals to the United States Court of Appeals for the Second Circuit from the judgment herein entered in the office of the Clerk of the United States District Court, Southern District of New York, on the 4th day of January, 1961, which grants summary judgment for the plaintiff.

Dated: New York, N. Y.,
 Feb. 28, 1961

[fol. 28]

—

IN UNITED STATES COURT OF APPEALS
 FOR THE SECOND CIRCUIT

—

No. 118—September Term, 1961

Argued November 30, 1961

Docket No. 26984

—

ANDRE MAXIMOV, as Trustee for the benefit of H. Robbin Fedden-u/a dated 10/24/47, Plaintiff-Appellee,

—v.—

UNITED STATES OF AMERICA, Defendant-Appellant.

—

Before: Clark, Friendly and Kaufman, Circuit Judges,

—

Appeal from the United States District Court for the Southern District of New York, Lloyd F. MacMahon, *Judge*.

The United States of America appeals from the grant of a refund of income taxes for 1954 and 1955 on an American *inter vivos* trust as being exempt therefrom under Article XIV of the Income Tax Convention between the United States and the United Kingdom. Reversed for judgment for defendant.

[fol. 29] Richard J. Medalie, Atty., Dept. of Justice, Washington, D. C. (Louis F. Oberdorfer, Asst. Atty. Gen., Meyer Rothwacks, Atty., Dept. of Justice, Washington, D. C., and Robert M. Morgenthau, U. S. Atty., S. D. N. Y., New York City, on the brief), for defendant-appellant.

William F. Suglia, of Hill, Betts, Yamaoka, Freehill & Longcope, New York City (John F. Lang, of Hill, Betts, Yamaoka, Freehill & Longcope, New York City, on the brief), for plaintiff-appellee.

OPINION—February 14, 1962

Clark, Circuit Judge:

The taxpayer, Andre Maximov, is the successor trustee of an *inter vivos* trust created in 1947, under the laws of Connecticut, by H. Robbin Fedden. Under the terms of the trust instrument all income is to be paid to the grantor during his life; on his death the income is payable to his wife if she survives him and is still married to him. On her death if she qualifies for this life estate, or on the grantor's if she does not, the entire principal of the trust is to be paid to the surviving issue of the grantor in equal shares, *per stirpes*, with limitations not here relevant. At the time the trust was created, and at all times thereafter, the grantor-beneficiary and his wife and children have resided in England.

During its taxable years 1954 and 1955 the trust realized net long-term capital gains from the sale of securities, resulting in tax liabilities of \$53.10 and \$1,316.32 respectively. Under Connecticut law these gains were retained

as corpus.¹ Maximov, as trustee, filed federal fiduciary [fol. 30] income tax returns for 1954 and 1955 with the District Director of Internal Revenue for Lower Manhattan reporting these gains, and paid the appropriate tax. Several years later, however, he filed a claim for refund of the tax on these two capital transactions, contending that as the gains were realized by a trust whose beneficiaries reside in the United Kingdom, they are exempt from United States tax under Article XIV of the Income Tax Convention between the United States and the United Kingdom, 60 Stat. (Part 2) 1377.

Under United States tax law the trust is treated as a separate taxable entity. *Freuler v. Helvering*, 291 U. S. 35. Income received by the trust and not distributable to the beneficiaries, or not includable in the trust's distributable net income, is taxable to the trust. As the income involved here was neither distributable nor part of the distributable net income of the trust, Internal Revenue Code of 1954, §643(c), these gains are considered the income of the trust, taxable to it, and are not the income of the life tenant or the remaindermen.

The Convention grants an exemption from United States tax on gains from the sale or exchange of capital assets to residents of the United Kingdom not engaged in a trade or business within the United States. Article XIV, 60 Stat. (Part 2) 1384. Were the trust a "resident" of the United Kingdom, as such a resident is defined in the Convention, or were this income includable in the gross income of the grantor-beneficiary, who is a resident of the United Kingdom and not engaged in a trade or business here, the exemption would be clearly applicable. See T. D. 5569, 1947-2 Cum. Bull. 100, §7.519(c). The difficulty which this case presents is that the trust is not a United Kingdom resident and the income here is treated in United States law as that of [fol. 31] the trust.² Since the exemption of Article XIV

¹ Conn. Gen. Stat. Ann. §45-112 (1958).

² A resident of the United Kingdom is defined as "any person (other than a citizen of the United States or a United States corporation) who is resident in the United Kingdom for the purposes

explicitly applies only to *residents* of the United Kingdom, the taxpayer's claim can be sustained only if we disregard the separate tax treatment accorded trusts by United States law.

This is precisely what the taxpayer urges us to do. He asserts that the word "exempt" in Article XIV should be read as signifying a "release from economic burden," and that as the economic burden of the tax falls here on United Kingdom residents—the grantor-beneficiary and his family—the exemption must be read as applying in this case. In support of this contention the taxpayer maintains that one purpose of the tax convention was to achieve reciprocity of tax treatment for the nationals of the contracting parties. Thus, he argues, the aim of Article XIV was to secure for United Kingdom residents realizing capital gains in the United States precisely the same treatment that a United States resident would be given on similar gains realized within the tax jurisdiction of the United Kingdom. Since the United Kingdom does not impose any income tax on profits it considers capital gains, and would not impose any tax on either an English trust or its beneficiaries, whether [fol. 32] they were residents of the United States or the United Kingdom, it would, so the argument runs, defeat the manifest purposes of the Convention to deny the exemption here.³ We must, it is therefore urged, ignore the

of United Kingdom tax and not resident in the United States for the purposes of United States tax." (Art. II(1)(g), 60 Stat. (Part 2) 1378. That this definition applies to the trust is clear. Art. II(3), 60 Stat. (Part 2) 1379, states that terms not defined in the Convention shall have the meaning given them by the laws of the country which is applying the treaty to a question of domestic taxation. Since the word "person" is not defined in the treaty, it is necessary to resort to United States law to determine whether or not a trust is a "person." Under United States law, as under British law, the term "person" encompasses a trust. Internal Revenue Code of 1954, §7701(a)(1), 26 U. S. C. §7701(a)(1); Harvard Law School, World Tax Series, Taxation in the United Kingdom 53 L.S. 34, pp. 125, 127 (1957). Since this trust is resident within the United States for purposes of United States tax, it cannot be considered a resident of the United Kingdom.

³ For a discussion of United Kingdom taxation of capital gains, see note 4 *infra*.

United States rule that the trust is a separate entity, treat trust and beneficiary as one taxpayer, and allow as a deduction from the trust income the exemption granted the beneficiary by the Convention. In essence the contentions are threefold: that Article XIV was designed to achieve equality of tax treatment; that even though the parties did not explicitly provide for an exemption in this situation, the Convention must be read as if they did in order to further the objective of equality; and that this construction must be adopted, regardless of its impact on domestic tax policy.

As we are unable to find any explicit consideration of the issues thus raised in the language or background of the agreement, these contentions require a fundamental evaluation of the purposes and aims of the Convention. The basic aim of treaty interpretation is to ascertain the intent of the parties who have entered into agreement, in order to construe the document in a manner consistent with that intent. *Rocca v. Thompson*, 223 U. S. 317, 331-332; Restatement, The Foreign Relations Law of the United States §129 (Tent. Draft No. 3, 1959). And to give the specific words of a treaty a meaning consistent with the genuine shared expectations of the contracting parties, it is necessary to examine not only the language, but the entire context of agreement. We must therefore examine all available evidence of the shared expectations of the parties to this Convention in order to answer the inter-related questions whether Article XIV was designed to achieve equality of tax treatment, and whether alterations [fol. 33] of domestic tax law as are here proposed to realize such equality are themselves consistent with the intent of the contracting parties.

An examination of the full text of the Convention and the context of agreement indicates that, while one of the reasons Article XIV was included in the Convention was to achieve "equality" of tax treatment, imposition of a tax in the circumstances of this case would not be inconsistent with this objective. For the "equality" the parties strived for in this Article, as in similar provisions, was a limited one; they struck a rough bargain and were willing to tolerate marginal inequities of the sort involved in this case. While this dilutes the force of the taxpayer's argu-

ment, it alone might not require a denial of the exemption. But further principles must be considered. There is strong evidence that in the several Articles whose primary aim was to achieve substantial equality of tax treatment as between nationals of the contracting parties, the mutual concessions made were clearly delimited within the four corners of the instrument. Where it was necessary to make adjustments in domestic provisions in order to achieve the objectives of the Article, these were made explicitly. Thus to sanction free-wheeling adjustment of domestic provisions to achieve point-by-point equality would be to risk undoing the bargain reached by the two nations. Finally, the Convention did not aim at achieving "equality" in a vacuum; the adjustments made equalizing tax treatment were made to achieve broader objectives of the treaty. Denial of the exemption here, while admittedly resulting in some inequality of tax treatment, will not affect those primary purposes.

Although Article XIV on its face is a one-way concession by the United States, it was designed to and does render the tax treatment of United Kingdom residents realizing capital gains in the United States substantially equal to [fol. 34] that of the United Kingdom. As we have said, it is reciprocal because the United Kingdom does not tax those profits it classifies as capital gains. But it does not achieve complete equality. In some ways the provision is more beneficial to the United States, for it exempts the gains of only those United Kingdom residents who are not engaged in a trade or business in the United States, while as a result of the United Kingdom policy of not taxing capital gains, a United States resident will be free of United Kingdom tax, regardless of whether he engages in a trade or business. On the other hand, the Convention sanctions the imposition of United Kingdom taxes in some instances where, as a result of Article XIV, a United Kingdom resident would be free of United States tax. For in many instances the United Kingdom does impose its standard tax on transactions which are considered to be the sale or exchange of capital assets under United States law, and

in some cases this would result in "unequal" treatment.⁴ For these reasons it cannot be said that, by including Article XIV in the Convention, the parties expected to establish wholly congruent tax treatment of capital gains realized by each other's residents.⁵

[fol. 35] Scrutiny of the manner in which this and similar Articles were drafted reinforces the conclusion that whatever "equality" the contracting parties desired to achieve was clearly defined in the Convention. These Articles were drafted with technical precision; no room was left for further adjustments of domestic law. Article VI, 60 Stat. (Part 2) 1381, provides a clear example. In order to equalize the treatment of dividends—a difficult task because of the great difference in United States and United Kingdom concepts of the nature of corporate profits—complex adjustments were made in the rates and manner of taxing of both countries. The United States lowered its rates, while the United Kingdom granted an exemption from surtax. This Article did not achieve a complete equivalence of treatment; the result of the adjustments was to guarantee that the total tax burden imposed by each nation would

⁴ It is commonly believed that Great Britain imposes no taxes on capital gains. This is true on a verbal level, and on a verbal level only. Comparative analysis of the two tax systems indicates that many functional transactions given capital-gains treatment in the United States are taxed as ordinary income in Great Britain. For example, gain on the sale of securities by an investment company is considered a capital gain in the United States and is taxed at the lower capital-gains rates. Internal Revenue Code of 1954, §§822, 832, 852. In the United Kingdom the same profits, far from being tax free, are treated as income and thus subject to the full standard tax. *Northern Assurance Co. v. Russell*, [1889] 2 T. C. 551 (U. K.). Other examples abound. Brudno & Hollman, *The Taxation of Capital Gains in the United States and the United Kingdom*, 1958 Brit. Tax Rev. 26, 134, *passim*.

⁵ Indeed, the Senate Committee which studied the Convention prior to ratification considered the possibility that, as a result of the disparity of capital-gain taxation between the countries, the United Kingdom resident would be at an advantage in some circumstances. Hearings on Executive D and E before a Subcommittee of the Committee on Foreign Relations of the United States Senate, 79th Cong., 1st Sess. 75 (1945). [Hereinafter cited as Hearings.]

be approximately the same. On close analysis Article XIV emerges as a similar technical adjustment. It is not a general exhortation to equality; it is addressed only to an exemption from United States tax, and is couched in the technical terminology of the Internal Revenue Code.⁷ Despite possible inequities which might arise from *United Kingdom* taxation of United States residents' gains, no provision was made for relief from United Kingdom tax.⁷ [fol. 36] The broad aim of the Convention, as with income tax treaties generally, was to facilitate commercial enterprise between the two countries.⁸ Specifically, the Convention was designed to avoid double taxation and prevent fiscal evasion.⁹ The prime target was double taxation, which, because of the high rates of income taxation then and now prevailing in the two nations, constituted what the Secretary of State called "an undesirable impediment to

⁶ The Convention was the result of a series of mutual concessions; there is evidence that Article XIV reflects a concession given by the United States in return for the counterconcession that the United Kingdom would co-operate in the exchange of tax information. Hearings, p. 62. Since the British policy of secrecy had stymied a prior attempt to negotiate a tax convention in 1937, *id.* at 56, it is clear that the bargain made was an important one.

⁷ It is true, as the taxpayer points out, that some of the differences between the two systems will be further equalized by the application of Article III(2), 60 Stat. (Part 2) 1380, which exempts United States enterprises not engaged in trade or business in the United Kingdom from United Kingdom tax on industrial or commercial profits. Instead of weakening our conclusion, however, this section reinforces it. Since Article III(2) applies only to "enterprises," it does not create the across-the-board equality urged here. See Article II(1)(j), 60 Stat. (Part 2) 1379. *Cf.* Ehrenzweig & Koch, *Income Tax Treaties* §211, p. 206 (1949). And the fact that Article III(2) will operate to eliminate some of the possible inequities created by Article XIV buttresses our conclusion that the latter Article was carefully drafted, and overrides domestic law only as explicitly specified.

⁸ Memorandum prepared for the Committee on Foreign Relations, United States Senate, Relative to Convention with Great Britain and Northern Ireland with Respect to Taxes on Income. Printed at Hearings, pp. 23, 27.

⁹ 60 Stat. (Part 2) 1377.

international trade.”¹⁰ A primary motivation for inclusion of provisions equalizing tax treatment such as Article XIV was reduction of tax barriers to the free movement of individuals for commercial purposes.¹¹ And exemption here is unnecessary to achieve these ends. There can be no double taxation, since neither the beneficiary¹² nor the ultimate recipients of the corpus¹³ will be taxable in the [fol. 37] United Kingdom on these gains. Thus¹⁴ we cannot see that such an exemption would affect commercial intercourse between the two countries in any significant manner.

With this background we must examine the taxpayer's argument that “exempt” as used in Article XIV must be read as signifying a “release from economic burden.” Of course the first difficulty with this argument is that it is wholly unclear that the entire economic burden of the tax will fall on United Kingdom residents. Since the tax constitutes a charge on the corpus, it will affect the present beneficiary only slightly by reducing the income; and, it is difficult to say now that when the ultimate recipients of the corpus take, they will all be residents of the United Kingdom. As we have indicated, adoption of such a broad interpretation of Article XIV is unnecessary to further the objectives of the Convention, and is inconsistent with the manner in which this provision was drafted. In these circumstances we can see no reason to override the technical language of the Convention which, in conjunction with the Internal Revenue Code, as incorporated by Article II(3), recognizes the trust as a separate taxable entity.

This is the interpretation of the Treasury Department taken in its original regulations issued in conjunction with

¹⁰ Hearings, p. 2. See also *id.* at 42.

¹¹ *Id.* at 27.

¹² See *Jones v. Leeming*, [1930] A. C. 415; Brudno & Hollman, *The Taxation of Capital Gains in the United States and the United Kingdom*, 1958 Brit. Tax Rev. 26, 42.

¹³ See *Trustees of the Will of Brodie v. Commissioners of Inland Revenue*, 17 T. C. 432, 438 (K. B. 1933) (dictum). Cf. Harvard Law School, World Tax Series, *Taxation in the United Kingdom* ¶10/7.2, pp. 307-308 (1957).

the Convention. These regulations took the position that a nonresident alien beneficiary of a domestic trust was exempt from tax on capital gains accrued by the trust only in so far as the gains are includable in his distributive share of the trust's income. T. D. 5569, 1947-2 Cum. Bull. 100, §7.519(c). A similar position recognizing that the trust is a separate taxable entity for the purpose of determining treaty exemptions has been taken in the interpretation of all our tax conventions.¹⁴ We hold that this [fol. 38] is the correct interpretation of Article XIV of this Convention.

In so holding, we are not unmindful of the decision of the Ninth Circuit in *American Trust Co. v. Smyth*, 9 Cir., 247 F. 2d 149, which held under similar circumstances that Article XIV created an exemption. This opinion, which was followed by the court below in this case, adopts the "economic burden" analysis.¹⁵ For the reasons advanced above we believe that decision to be erroneous, and accept instead the reasoning of Judge Carter in the decision there reversed, *American Trust Co. v. Smyth*, D. C. N. D. Cal., 141 F. Supp. 414. See in accord with the view we are taking

¹⁴ E.g., Australia, T. D. 6108, Cum. Bull. 1954-2, 614, §501.10; Austria, T. D. 6322, Cum. Bull. 1954-1, 132, §516.8; Belgium, T. D. 6160, Cum. Bull. 1956-1, 815, §504.119; France, T. D. 6273, Cum. Bull. 1956-1, 837, §514.7; Switzerland, T. D. 6149, I. R. B. 1957-19, 42.

¹⁵ In *American Trust Co. v. Smyth*, 9 Cir., 247 F. 2d 149, the Ninth Circuit also laid some stress on the fact that this Convention, unlike many United States Conventions with other countries, did not have a "savings clause." This clause allows the United States to impose a tax on all of its residents or citizens or domestic corporations "as though this convention had not come into effect." E.g., Art. XIX(1) of the Convention with Norway, 62 Stat. (Part 2) 1764. Although the United Kingdom treaty does not have a clause precisely to this effect, the same limiting function is played by the definition of "resident of the United Kingdom" in Article II(1)(g), 60 Stat. (Part 2) 1378, which excludes citizens of the United States, United States corporations, and persons resident in the United States for the purpose of United States tax. Since only residents of the United Kingdom are granted any exemption from United States tax under the treaty, compare Articles III, VI, VII, VIII, IX, XI, XII, and XIV, this provision acts as a savings clause. Thus we ascribe no significance to the absence of such a clause from the United Kingdom Convention.

the Note, 71 Harv. L. Rev. 1163 (1958), though contra are Note, 9 Stan. L. Rev. 610 (1957), and Note, 33 N. Y. U. L. Rev. 233 (1958).

Reversed and remanded for the entry of judgment for the defendant.

[fol. 39] IN UNITED STATES COURT OF APPEALS
 FOR THE SECOND CIRCUIT

Present: Hon. Charles E. Clark, Hon. Henry J. Friendly,
 Hon. Irving R. Kaufman, Circuit Judges.

ANDRE MAXIMOY, as Trustee for the benefit of H. Robin
 Fedden u/a Dated 10/24/47, Plaintiff-Appellee,

v.

UNITED STATES OF AMERICA, Defendant-Appellant.

Appeal from the United States District Court for the
 Southern District of New York.

JUDGMENT—February 14, 1962

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and that the action be and it hereby is remanded for the entry of judgment for the defendant-appellant in accordance with the opinion of this court.

A. Daniel Fusaro, Clerk.

[fol. 40] [File endorsement omitted]

[fol. 41] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 42] SUPREME COURT OF THE UNITED STATES

No. —October Term, 1961

ANDRE MAXIMOV, as Trustee, etc., Petitioner,

vs.

UNITED STATES.

ORDER EXTENDING TIME TO FILE PETITION FOR
WRIT OF CERTIORARI—May 8, 1962

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 14th, 1962.

Dated this 8th day of May, 1962.

John M. Harlan, Associate Justice of the Supreme
Court of the United States.

[fol. 43] SUPREME COURT OF THE UNITED STATES

No. 240—October Term, 1962

ANDRE MAXIMOV, etc., Petitioner,

vs.

UNITED STATES.

ORDER ALLOWING CERTIORARI—October 8, 1962

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Goldberg took no part in the consideration or decision of this petition.